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No. .....

In the Supreme Court of the United States

October Term, 1982

FINAU F. MILA and ANAU S. FAINGA,
Petitioners,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service may, contrary to a clear expression of congressional intent, add an extra-statutory requirement to the term "adopted" in 8 U.S.C. § 1101(b)(1)(E) that excludes from this country persons adopted in countries where adoption is practiced by custom and is regarded as creating a bona fide family relationship.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

1. THE DECISION BELOW FORCES MANY FAMILIES TO CHOOSE BETWEEN REMAINING IN THEIR HOME COUNTRIES AND LEAVING THEIR ADOPTED CHILDREN BEHIND 5

2. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS THAT HAVE REFUSED TO DEFER TO RESTRICTIVE INS STATUTORY INTERPRETATIONS THAT ARE CONTRARY TO CONGRESSIONAL INTENT 10

CONCLUSION 14

APPENDIX

1. OPINION OF THE COURT OF APPEALS A-1

Page

2. ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC A-11

3. OPINION OF THE UNITED STATES DISTRICT COURT A-13

4. DECISION OF THE BOARD OF IMMIGRATION APPEALS A-19

5. DECISION OF THE DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE A-25

TABLE OF AUTHORITIES

Cases

Andrade v. Esperdy,
270 F. Supp. 516 (S.D.N.Y. 1967) 11

Bark v. Immigration & Nationalization Service,
511 F.2d 1200 (9th Cir. 1975) 13

Chan v. Bell,
464 F. Supp. 125 (D.D.C. 1978) 13

Dabaghian v. Civiletti,
607 F.2d 868 (9th Cir. 1979) 13

Immigration & Naturalization Service v. Wang,
450 U.S. 139 (1981) 14

Page

Kaliski v. District Director,
620 F.2d 214 (9th Cir. 1980) 11, 12

Kamheangpatiyooth v. Immigration & Naturalization Service,
597 F.2d 1253 (9th Cir. 1979) 13

Lau v. Kiley, 563 F.2d 543 (2d Cir. 1977) 12

Logan v. Zimmerman Brush Co.,
102 S.Ct. 1148 (1982) 10

Mila v. District Director of the Denver, Colorado District of the Immigration & Naturalization Service,
678 F.2d 123 (10th Cir. 1982) 1, 5, 7, 8, 9, 10

Mila v. District Director of the Denver, Colorado District of the Immigration & Naturalization Service,
494 F. Supp. 998 (D. Utah 1980) 1, 5, 7, 9

Nation v. Esperdy,
239 F. Supp. 531 (S.D.N.Y. 1965) 11

Nazareno v. Attorney General, 512 F.2d 936 (D.C. Cir.), *cert. denied*, 423 U.S. 832 (1975) 3

Palmer v. Reddy, 622 F.2d 463 (9th Cir. 1980) .. 11

Ruangswang v. Immigration & Naturalization Service, 591 F.2d 39 (9th Cir. 1978) 13

Tovar v. Immigration & Naturalization Service,
612 F.2d 794 (3d Cir. 1980) 13

Page

Whetstone v. Immigration & Naturalization Service, 561 F.2d 1303 (9th Cir. 1977) 13

Yui Sing Tse v. Immigration & Naturalization Service, 596 F.2d 831 (9th Cir. 1979) 13

Statutes

5 U.S.C. § 701 4

8 U.S.C. § 1101(b)(1) 3, 10

8 U.S.C. § 1101(b)(1)(B) 11

8 U.S.C. § 1101(b)(1)(C) 12

8 U.S.C. § 1101(b)(1)(E) 2, 3, 4, 6, 9

8 U.S.C. § 1153(a)(5) 2, 3

8 U.S.C. § 1329 4

8 U.S.C. § 1254(a)(1) 14

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331(a) 4

28 U.S.C. § 2201 4

Act of Dec. 29, 1981, Pub. L. No. 97-116, § 2(b), 95 Stat. 1611 4

Board of Immigration Appeals Cases

Matter of B...., 9 I & N Dec. 521 (BIA 1961) 6

Matter of Benjamin, 15 I & N Dec. 709 (BIA 1976) 6

Page

Matter of Boghadi,
12 I & N Dec. 666 (BIA 1968) 6

Matter of Ho, Interim Decision
No. 2887 (BIA Oct. 6, 1981) 6

Matter of Moreira, Interim Decision
No. 2720 (BIA July 16, 1979) 11

Matter of Mozeb,
15 I & N Dec. 430 (BIA 1975) 6

Matter of Ng, 14 I & N Dec. 135 (BIA 1972) 5

Matter of Rehman,
15 I & N Dec. 512 (BIA 1975) 6

Matter of Yue, 12 I & N Dec. 747 (BIA 1968) 5

Legislative History

H.R. Doc. No. 520, 82d Cong.,
2d Sess., 98 *Cong. Rec.* 8225 (1952) 9

H.R. Rep. No. 1365, 82d Cong.,
2d Sess. (1952) 9

H.R. Rep. No. 1199, 85th Cong.,
1st Sess. (1957) 9

H.R. Rep. No. 1553, 94th Cong.,
2d Sess. (1976) 9

Veto Message of June 25, 1952, H.R. Doc. No.
520, 82d Cong., 2d Sess.,
98 *Cong. Rec.* 8225 (1952) 9

103 *Cong. Rec.* 16301, 85th Cong.,
1st Sess. (1957) 9

No. .....

In the Supreme Court of the United States

October Term, 1982

FINAU F. MILA and ANAU S. FAINGA,
Petitioners,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners Finau F. Mila and Anau S. Fainga respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 19, 1982.

OPINIONS BELOW

The opinion of the court of appeals is reported at 678 F.2d 123 (10th Cir. 1982). The opinion of the District Court for the District of Utah is reported at 494 F. Supp. 998 (D. Utah 1980). The decision of the

Board of Immigration Appeals is unreported. All appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 19, 1982. A timely petition for rehearing was denied on June 2, 1982. On August 25, 1982, Mr. Justice White extended the time for filing this petition to September 30, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 U.S.C. § 1101(υ)(1)(E) provides in pertinent part:

> (b) As used in titles I and II —
>
> (1) The term "child" means an unmarried person under twenty-one years of age who is —
>
> * * *
>
> (E) a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

8 U.S.C. § 1153(a)(5) provides in pertinent part:

> (a) Aliens who are subject to the numerical limitations specified in section 201(a) [1151(a)] shall be allotted visas as follows:
>
> * * *

> (5) Visas shall next be made available, in a number not to exceed 24 per centum of the number specified in section 201(a)(1) or (2) [1151(a)(1) or (2)], plus any visas not required for the classes specified in paragraphs (1) through (4), to qualified immigrants who are the brothers or sisters of citizens of the United States provided such citizens are at least twenty-one years of age.

STATEMENT OF THE CASE

Petitioners Finau F. Mila and Anau S. Fainga were raised as brother and sister in the Kingdom of Tonga, a cluster of islands in the South Pacific. Miss Fainga was adopted at birth by Mr. Mila's mother under a centuries-old Tongan custom recognizing adoption among close relatives. (Miss Fainga's natural mother is Mr. Mila's aunt.) There is no other method or procedure under Tongan law by which Miss Fainga could have been adopted. Mr. Mila became a United States citizen and filed a petition pursuant to 8 U.S.C. § 1153(a)(5) to have the Immigration and Naturalization Service ("INS") classify Miss Fainga as the sister of a United States citizen, which would allow her to receive an otherwise practically unavailable permanent visa. That section gives preference in obtaining permanent visas to brothers and sisters of United States citizens. To establish a brother-sister relationship, the brother and sister must be "children" of a common parent as defined in 8 U.S.C. § 1101(b)(1). *Nazareno v. Attorney General*, 512 F.2d 936 (D.C. Cir.), *cert. denied*, 423 U.S. 832 (1975). Adopted children must meet the requirements of 8 U.S.C. § 1101(b)(1)(E):

> (E) a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. . . .[1]

The INS did not contend that the petition failed to comply with the three requirements set out in § 1101 (b)(1)(E). But the INS added a fourth requirement, that the adoption be affirmatively recognized by Tongan statutes, and denied the petition on the ground that in Tonga the adoption of legitimate children is governed by custom rather than statute.[2] The Board of Immigration Appeals dismissed the petitioners' appeal on the same ground.

The petitioners sought review of the Board's decision in the district court pursuant to 5 U.S.C. § 701, 8 U.S.C. § 1329 and 28 U.S.C. §§ 1331(a), 2201. The district court reversed, finding that there was a bona fide parent-child relationship and that the INS interpretation adding an additional requirement to 8 U.S.C. § 1101(b)(1)(E) is unreasonable because it unjustifiably discriminates against persons from countries sanctioning adoption by custom rather than by statute. It is also inconsistent with the legislative history demonstrating that the Immigration and Nationality Act was in-

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[1] In 1981 this section was amended to raise the age limit for adoption from fourteen to sixteen years. Act of Dec. 29, 1981, Pub. L. No. 97-116, § 2(b), 1981 U.S. Code Cong. & Ad. News (95 Stat.) 1611.

[2] Although the INS in this case complains only in general terms that customary adoption in Tonga fails to create a "legal status" or a "legal relationship," In re Fainga (BIA 1979) (unreported), Appendix at 21, 22, it is clear that the INS would recognize such adoptions in Tonga only if they were authorized by staute or evidenced by some sort of juridical act.

tended to recognize bona fide relationships and preserve genuine family units. 494 F. Supp. at 1000, Appendix at 18.

A divided court of appeals, with Judge McKay dissenting, reversed the district court's judgment and reinstated the INS denial of the petition on the ground that the district court did not defer to the INS interpretation of the statute. The majority of the court of appeals required the petitioners to show that the INS interpretation was unreasonable and lacked any rational basis. 678 F.2d at 126, Appendix at 7.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW FORCES MANY FAMILIES TO CHOOSE BETWEEN REMAINING IN THEIR HOME COUNTRIES AND LEAVING THEIR ADOPTED CHILDREN BEHIND.

The INS has refused to recognize customary adoptions in almost every country.[3] As a result, adopted

[3] The INS has recognized customary adoption only under Chinese law as practiced in Hong Kong and Taiwan. **Matter of Ng**, 14 I & N Dec. 135 (BIA 1972); **Matter of Yue**, 12 I & N Dec. 747 (BIA 1968). The INS recognizes Chinese customary adoptions because the Tsing Code, which is the basis of Chinese law, "recognized" informal adoption, although it gave the informally adopted child no inheritance rights and required no governmental or judicial approval.

The INS has recently refused to recognize an adoption occurring in the People's Republic of China because it was unable to determine the legal status of adoption in that country. The Board of Immigration Appeals remanded the case with instructions that the petitioner sustain her burden of proving that adoptions are legally valid in the People's Republic of China (which the INS with the help of

children from Moslem countries, with a total population of almost 600 million people, are excluded because Islamic law does not recognize adoption. *Matter of Benjamin*, 15 I & N Dec. 709 (BIA 1976) (Iraq); *Matter of Mozeb*, 15 I & N Dec. 430 (BIA 1975) (Yemen Arab Republic); *Matter of Rehman*, 15 I & N Dec. 512 (BIA 1975) (Pakistan); *Matter of Boghadi*, 12 I & N Dec. 666 (BIA 1968) (Egypt). In *Matter of Benjamin, supra*, an adoption took place in Iraq under the laws of the Chaldean Catholic Church, to which the adopting parents belonged. The INS, however, still refused to honor the adoption because it occurred in a country whose government recognizes Islamic law. The INS has also refused to recognize adoptions in the Netherlands Antilles, with a population of 275,000, *Matter of B....*, 9 I & N Dec. 521 (BIA 1961), and in Tonga, with a population of 100,000, in this case.

Under the INS interpretation of 8 U.S.C. § 1101 (b)(1)(E), sustained by the court of appeals, families from these countries which receive permanent visas must either decline the visas or leave their adopted children behind. Customary adoption in these countries will not be recognized no matter how genuine the family unit, how close the relationship between parent and adopted child or how well established the practice of customary adoption. The INS justified this result in the present case

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[3] **Continued**

the Library of Congress had been unable to determine). **Matter of Ho**, Interim Decision No. 2887 (BIA Oct. 8, 1981). Thus the INS threatens to exclude 970 million people from those whose adoptive relationships may be recognized.

on the basis of a letter from the Tongan Crown Solicitor stating:

> There is no provision in our law for the adoption of children born legitimately. Nevertheless it has been a common practice in Tonga for relatives to raise and maintain children, including legitimate children as part of the family and to treat them in all respects as if they were legally adopted. Such "adoption" does not give the child any legal right in the estate of the foster parent and is not recognized as legally valid under Tongan law.

678 F.2d at 125-26, Appendix at 5. The Crown Solicitor, whose opinion the INS had requested on the question of whether adoptions were recognized in Tonga but who had not been informed of the case before the INS or what use would be made of his reply, omitted the following information that the record now contains:

> (1) Customary adoption creates "legal custody" under Tongan law inasmuch as parents who give their child up for customary adoption, if they later change their minds, cannot force the adopting parents to return the child. Record at 36-37, ¶32.[4]
>
> (2) Evidence of Tongan customs is admissible in Tongan courts. Land courts have special "assessors" who sit with them to advise the judge of relevant Tongan customs. Customs are enforced unless specifically superseded by the written statutes or constitution. 678 F.2d at 126, Appendix at 6; Record at 34-35, ¶¶20, 25.

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[4] "Record" refers to the record on appeal in the Tenth Circuit.

(3) Evidence of customary adoption was dispositive in the only relevant reported cases before the Tongan courts. 678 F.2d at 126, Appendix at 6; Record at 35-36, ¶¶23, 27.

(4) Tonga has a statute that specifically sanctions the adoption of illegitimate children, but no mention is made of legitimate children like Miss Fainga. Tongan custom therefore controls with regard to legitimate children. 678 F.2d at 124, Appendix at 2; Record at 34, ¶¶16, 20.

(5) Neither statutorily adopted illegitimate children nor customarily adopted legitimate children may inherit from their adopting parents. 678 F.2d at 126, Appendix at 5.

Judge McKay observed in his dissenting opinion that the Crown Solicitor's letter, when read with this additional information, stands for the "compelling" proposition that in Tonga customarily adopted children are treated exactly like natural children except with regard to inheritance rights. He also noted the bizarre result of an INS rule that would recognize a statutorily adopted illegitimate child but not a customarily adopted legitimate child, even though the wardship is permanent and enforceable in each case and neither kind of adopted child has any inheritance rights. Judge McKay called this distinction between statutorily and customarily adopted children "unprincipled." 678 F.2d at 127, Appendix at 10.

Not only is this distinction unprincipled, but it is

inconsistent with the legislative history, which shows that Congress intended that the Act be liberally construed to recognize bona fide family relationships and preserve genuine family units. *E.g.*, H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1680; *id.* at 1691 ("well-established policy of maintaining the family unit wherever possible"); Veto Message of June 25, 1952, H.R. Doc. No. 520, 82d Cong., 2d Sess., 98 *Cong. Rec.* 8225 (1952) (act contains many "clearly desirable" steps "toward preserving the integrity of the family"); H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7-8, *reprinted in* 1957 U.S. Code Cong. & Ad. News 2016, 2020-2021; 85th Cong., 1st Sess., 103 *Cong. Rec.* 16301 (1957) (remarks of Mr. Rodino and Mr. Cellar); *id.* at 16307 (remarks of Mr. Barrett); *id.* at 16308 (remarks of Mr. Eastland); *id.* at 15497 (remarks of Mr. Pastore); H.R. Rep. No. 1553, 94th Cong., 2d Sess. 2, 4-5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6073-6074, 6076 ("principles of equity and family reunification as the basis of our immigration policy"). The District Court found the "clear legislative intent . . . to preserve the genuine family unit," and required the INS to look to "the reality of the relationship and not to the manner in which it arises." 494 F. Supp. at 1000, Appendix at 18. Judge McKay agreed that 8 U.S.C. § 1101(b)(1)(E) requires the INS to "review foreign adoptions with an eye to preserving genuine family relationships." 678 F.2d at 126, Appendix at 8.

Even the majority of the court of appeals conceded that "a broader interpretation would recognize and help

to preserve some families that suffer under the INS interpretation." 678 F.2d at 126, Appendix at 7. Nevertheless, the majority of the court of appeals accepted the INS interpretation because it was "a reasonable construction." *Id.* This so-called "reasonable construction" arbitrarily creates two classes of adopted children that are accorded radically disparate treatment. Such an irrational classification is forbidden by the Fifth Amendment's guarantee of equal protection. Under the INS interpretation a Tongan parent who has become a U.S. citizen can obtain preferred status for his statutorily adopted child whereas a similar parent of a customarily adopted child cannot, even though under Tongan law both children have identical rights. *Cf. Logan v. Zimmerman Brush Co.*, 102 S.Ct. 1148 (1982). Avoiding this constitutional problem is another reason why the INS interpretation should be reversed.

2. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS THAT HAVE REFUSED TO DEFER TO RESTRICTIVE INS STATUTORY INTERPRETATIONS THAT ARE CONTRARY TO CONGRESSIONAL INTENT.

Congress set out in the six subsections of 8 U.S.C. § 1101(b)(1) of the Act criteria for determining those children entitled to visa preferences. Each subsection contains the specific restrictions Congress thought necessary to prevent fraud. Nevertheless, in interpreting the statutory definitions, the INS has consistently attempted

to impose additional requirements that narrow these definitions, which is contrary to the congressional purpose of recognizing bona fide relationships and keeping families together. Other courts of appeals have reversed these attempts and, unlike the Tenth Circuit, have refused to acquiesce in the agency's interpretation in light of the Act's legislative history.

In *Palmer v. Reddy*, 622 F.2d 463 (9th Cir. 1980), the Ninth Circuit refused to accept an INS interpretation of the term "stepchild," stating tersely that the statute did not authorize the INS to add restrictive conditions to the definition. The statutory language contains only one hurdle: that the child be under 18 when the stepparent is married.[5] Nevertheless, until the Ninth Circuit acted, the INS had gone beyond the literal words of the statute to require that the stepparent reside with and care for the child or demonstrate an active parental interest in the child's support, instruction and welfare. *Matter of Moreira*, Interim Decision No. 2720 (BIA July 16, 1979).[6]

Similarly, in *Kaliski v. District Director*, 620 F.2d

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[5] In § 1101(b)(1)(B) a child is defined to include "a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred."

[6] In so ruling, the Ninth Circuit followed two earlier district court decisions that had also struck down INS attempts to add conditions to the definition of "stepchild". **Andrade v. Esperdy**, 270 F. Supp. 516 (S.D.N.Y. 1967); **Nation v. Esperdy**, 239 F. Supp. 531 (S.D.N.Y. 1965). The INS, however had been undaunted by the earlier decisions and refused to follow them in **Palmer v. Reddy, supra**, until compelled to do so by the Ninth Circuit.

214 (9th Cir. 1980), the Ninth Circuit reversed an INS interpretation that added restrictive conditions to the definition of a "legitimated" child.[7] The Court of Appeals found that the additional requirement was inconsistent with the Act's purpose of reuniting families and that it discriminated against families from countries with strict legitimation requirements.

The Second Circuit, a few years earlier, struck down a similarly restrictive INS interpretation of the definition of "legitimated" child. In *Lau v. Kiley*, 563 F.2d 543 (2d Cir. 1977), the INS refused to accept as legitimated a child born in China, whose law made no distinction between legitimate and illegitimate children. The INS argued that the statutory definition required some form of "legal" paternity proceeding, and that since no such proceeding had taken place, the child had not been legitimated. Like the Ninth Circuit in *Kaliski*, the Second Circuit reversed the INS on the ground that its requirement of a legal proceeding was unwarranted by the stat-

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[7] An illegitimate child may be considered to be the child of his father if "legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent . . . at the time of such legitimation." 8 U.S.C. § 1101(b)(1)(C).

Mr. Kaliski, a native of Yugoslavia, had an illegitimate child in Yugoslavia and lived with the child for seven years until 1941, when he was interned in a German prisoner-of-war camp. In 1953, when his child was 19, Mr. Kaliski moved to California. California law retroactively recognized as legitimating acts Mr. Kaliski's living with and acknowledgment of his child in Yugoslavia many years earlier. The INS refused to recognize Mr. Kaliski's child, contending that the father or child must begin residing in the jurisdiction recognizing the legitimation before the child's eighteenth birthday.

utory language and was inconsistent with the Act's purpose of family reunification.[8] *See also Tovar v. Immigration & Naturalization Service*, 612 F.2d 794, 797 (3d Cir. 1980) (reversing a restrictive INS interpretation of the statute that failed to allow consideration of hardship to a grandchild if the grandmother was deported and stating "federal courts have plenary review of questions of law, involving questions of statutory construction and interpretation").

The INS decision in the instant case is just like the many reversed by other courts of appeals: it adds a restrictive condition to the statute. The Tenth Circuit's affirmance of this decision because it is "reasonable" stands in stark contrast to decisions of the Second, Third and Ninth Circuits. By requiring deference to a restrictive INS construction of the Act without seriously considering whether that construction does violence to the congressional purpose, the court of appeals abdicated

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[8] The same pattern of restrictive INS interpretation and reversal by the courts can be seen in other sections of the Immigration and Nationality Act. Attempts to add requirements of "continuing vitality" to marriages between citizens and aliens have been rejected in the courts. **Dabaghian v. Civiletti**, 607 F.2d 868 (9th Cir. 1979); **Whetstone v. Immigration & Naturalization Service**, 561 F.2d 1303 (9th Cir. 1977); **Bark v. Immigration & Naturalization Service**, 511 F.2d 1200 (9th Cir. 1975); **Chan v. Bell**, 464 F. Supp. 125 (D.D.C. 1978). Outside the family law area, the same pattern persists. **Kamheangpatiyooth v. Immigration & Naturalization Service**, 597 F.2d 1253 (9th Cir. 1979) (discretionary suspension of deportation); **Yui Sing Tse v. Immigration & Naturalization Service**, 596 F.2d 831 (9th Cir. 1979) (immigration labor certificate); **Ruangswang v. Immigration & Naturalization Service**, 591 F.2d 39, 43-44 (9th Cir. 1978) ("there simply is no room for the agency to interpret the regulation so as to add another requirement.").

the judicial function in a way that is inconsistent with the decisions of other circuits.[9] As a result, the INS has effectively been allowed to amend the Act to exclude nearly all customarily adopted children in the world, while recognizing statutorily adopted children with identical rights.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

September 30, 1982.

Respectfully submitted,

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[9] The Court's decision in **Immigration & Naturalization Service v. Wang**, 450 U.S. 139 (1981) (per curiam) does not control the case at bar. **Wang** involved the interpretation of 8 U.S.C. § 1254(a)(1) in which Congress expressly reserved the interpretation of "extreme hardship" to the Attorney General.

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FINAU F. MILA and ANAU S. FAINGA,
Plaintiffs-Appellees,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellant.

No. 80-2072

April 19, 1982

Rehearing Denied June 2, 1982

Jimmy Gurule, Washington, D.C. (James P. Morris, Crim. Div., Dept. of Justice, Washington, D.C., with him on the briefs), Attys., for defendant-appellant.

Charles B. Casper of Fabian & Clendenin, Salt Lake City, Utah, for plaintiffs-appellees.

Terry J. Helbush, San Francisco, Cal., filed an amicus curiae brief for the Immigration and Nationality Lawyers Association.

Before SETH, Chief Judge, and McKAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

The government appeals from the district court's judgment that the Immigration and Naturalization Service (INS) incorrectly denied Anau S. Fainga preferential status as the sister of Finau F. Mila, a naturalized United States citizen, in qualifying for a permanent visa. *See* 8 U.S.C. § 1153(a)(5). Fainga, a native of the Kingdom of Tonga, was adopted by her mother's sister (Mila's mother) shortly after birth. Because Tongan law provides only for legal adoptions of children born illegitimately and Fainga was born legitimately, the adoption was according to Tongan custom. The INS interpreted the statute that defines "adopted children" as excluding Tongan children adopted by custom. The district court disagreed with the INS interpretation. The controlling issue on appeal is whether the district court gave too little deference to the INS interpretation.

To guide the INS in determining the order in which aliens subject to numerical quotas may become lawful permanent residents of the United States, Congress has set forth a system of priorities under which brothers and sisters of United States citizens are entitled to preferential treatment. *See* 8 U.S.C. § 1153(a)(5). To establish a brother-sister relationship, petitioner and the beneficiary of the preference must show they are "children" of a common parent as defined at 8 U.S.C. § 1101(b)(1). *Matter of Clahar*, 16 I & N Dec. 484, 485 (BIA 1978). Adopted children must meet the requirements of 8 U.S.C. § 1101(b)(1)(E):

> "(E) a child adopted while under the age of fourteen years if the child has thereafter been in the

> legal custody of, and has resided with, the adopting parent or parents for at least two years . . . ."

Petitioner has the burden of establishing that the purported adoption accords with the law of the country where it took place. *Matter of Garcia-Rodriguez*, 16 I & N Dec. 438, 439 (BIA 1978).

The INS district director does not dispute that Fainga was adopted by custom, but denied Mila's petition because Fainga's adoption was not a legal one. The Board of Immigration Appeals affirmed the district director's decision and dismissed Mila's appeal. On review the district court reversed and remanded, directing that Fainga be given preferential status because Tongan custom recognizes Fainga as the bona fide adopted daughter of Mila's mother. The district court held the INS requirement of legal adoption was unduly restrictive and misinterpreted congressional intent, declaring that so long as a bona fide parent-child relationship exists, the INS has no reason to distinguish between a country that provides for adoption by law and one that provides for adoption by custom.

A federal court may reverse an INS denial of a preferential visa petition only if the INS abused its discretion. The INS abuses its discretion if it bases its decision upon an improper understanding of the law. *Kalaski v. District Director of Immigration and Naturalization Service*, 620 F.2d 214, 216 n.1 (9th Cir. 1980). The Supreme Court has recognized that the construction of a statute by those charged with its administration is

entitled to substantial deference. *See, e.g., United States v. Rutherford,* 442 U.S. 544, 553, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 (1979). If reasonable and not contrary to the discernible intent of Congress, the agency's interpretation should be approved even though it is not the only reasonable interpretation or the one the reviewing court would make if deciding the issue in the first instance. *See Unemployment Compensation Comm'n v. Aragon,* 329 U.S. 143, 153-54, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946); *Nazareno v. Attorney General,* 512 F.2d 936, 939-40 (D.C. Cir. 1975).

The INS interprets 8 U.S.C. § 1101(b)(1)(E) as requiring an adoption to accord with the laws of the country where it allegedly occurred. *Matter of Garcia-Rodriguez,* 16 I & N Dec. 438, 439 (BIA 1978). If that country has a legal procedure for adoption, the INS insists that the petitioner prove the adoption met those requirements. *See Matter of Kong,* 15 I & N Dec. 224 (BIA 1975); *Matter of Kwik,* 13 I & N Dec. 89 (BIA 1968). If the country has no formal adoption system, the INS recognizes customary adoption, but only if that country's courts accept customary adoption as legally valid. The INS has recognized China's customary adoptions because China's legal system treats customarily adopted children as having rights equal in all respects to natural children. *See Matter of Kwok,* 14 I & N Dec. 127, 128-29 (BIA 1972). But if the country does not legally acknowledge customary adoption, the INS, at least since 1961, has refused to find an adoption valid for immigration purposes. *Matter of B,* 9 I & N Dec. 521 (BIA 1961); *accord, Matter of Palelei,* 16 I & N Dec.

716 (BIA 1979); *Matter of Benjamin*, 15 I & N Dec. 709 (BIA 1976); *Matter of Ashree, Ahmed and Ahmed*, 14 I & N Dec. 305 (BIA 1973).

The INS concluded that Tongan law does not recognize Tongan customary adoptions as legally valid and therefore denied Mila's petition, relying upon *Matter of Palelei*, 16 I & N Dec. 716 (BIA 1979), also involving a Tongan customary adoption. That decision relied on a letter of the Tongan Crown Solicitor stating:

> "There is no provision in our law for the adoption of children born legitimately. Nevertheless it has been a common practice in Tonga for relatives to raise and maintain children, including legitimate children as part of the family and to treat them in all respects as if they were legally adopted. Such 'adoption' does not give the child any legal right in the estate of the foster parent and is not recognized as legally valid under Tongan law."

Letter from Crown Solicitor of Tonga to American-British Law Division, Library of Congress (Jan. 16, 1978) (*quoted in Matter of Palelei*, 16 I & N Dec. at 718). The INS emphasis has continued to be upon proof of the relationship, stressing need for a court decree or "legal recognition" of the adoption.

Appellees contend that the INS overemphasizes inheritance rights, which is particularly inappropriate in the instant case since no adopted child, whether legally or customarily adopted, may inherit under Tongan law. *See* Tonga Const. § 111; Law of Tonga c. 63, § 76(ii)

(1967). Except for references by the dissent in *Matter of Kong*, 15 I & N Dec. 224, 226 (BIA 1975), we see in INS decisions no special emphasis upon inheritance rights of adopted children. *See Matter of Ng*, 14 I & N Dec. 135, 139 (BIA 1972) (customarily adopted daughter entitled to preferential status though Chinese law restricted inheritance to sons).

Although appellees can cite no authority holding Tongan customary adoptions legally valid, they maintain that Tongan customs are generally recognized in Tongan law. In support, they submit that in legal proceedings testimony of Tongan customs is admissible into evidence, Law of Tonga c. 13, §§ 5, 27 (1967), and that "assessors" sit with Tongan land courts to advise on customs relevant to disputes over land, Law of Tonga pt. IX, § 123. The amicus brief adds that in 1911, in the only reported Tongan case involving custody of a customarily adopted child, the adopting parents prevailed over a natural grandfather. Amicus Br. p. 18. But the single instance of a Tongan court awarding legal custody of a child to his customary adoptive parents rather that his natural grandfather does not negate the general rule stated by the Tongan Crown Solicitor. In spite of the general Tongan treatment of customs, Mila and Fainga do not claim that Tongan customary adoptions have the legal status under Tongan law required by the INS.

Furthermore, Mila and Fainga contend the INS interpretation of 8 U.S.C. § 1101(b)(1)(E) is unduly restrictive and thwarts the congressional intent of preserving the family unit by ignoring the genuineness of a

family relationship. We agree that a broader interpretation would recognize and help to preserve some families that suffer under the INS interpretation. We think the instant case is a close one on the law. Since more people seek to immigrate into the United States than are permitted by congressionally established quotas, the INS interpretation benefits families with legally adopted children. It has the practical advantages of decreasing the likelihood of fraud, serving as a relatively bright line to determine which adoptions will be recognized for immigration purposes, and insuring that persons who bring adopted children into this country are legally responsible for their care. The legislative history is not so clear that we can say the INS interpretation is wrong. The INS has expressed its view in opinions issued at least since 1961, *see Matter of B*, 9 I & N Dec. 521 (BIA 1961), and since that date Congress has amended 8 U.S.C. § 1101 many times without changing the definition of adopted children. Thus, we hold that while the INS interpretation is not the only reasonable one, it is a reasonable construction and the district court erred in failing to defer to it.

Because we have found reasonable the INS interpretation of 8 U.S.C. § 1101(b)(1)(E), and Mila and Fainga do not contend that Tongan customary adoptions meet the standard set by that interpretation, the INS did not abuse its discretion in denying the petition.

494 F.Supp 998. REVERSED.

McKAY, Circuit Judge, dissenting:

When Congress adopted 8 U.S.C. § 1101(b)(1)(E), I am satisfied that it mandated that the Immigration and Naturalization Service review foreign adoptions with an eye to preserving genuine family relationships. The Service itself recognizes that at least in some instances common law (customary) adoptions will satisfy the statute even though such adoptions exist outside an established formal adoption scheme. *Matter of Ng*, 14 I & N Dec. 135 (BIA 1972); *Matter of Yue*, 12 I & N Dec. 747 (BIA 1968). In this case the trial court correctly held that the Service ignored the statutory mandate in an attempt to establish something approximating a bright line test that places too much reliance on some formal juridical anglo-American notions of adoption and too little emphasis on whether the country recognizes these relationships as genuine family units.

The Service relies heavily on a letter of the Tongan Crown Solicitor for its proposition that Tongan law does not recognize customary adoptions as legally valid. This letter supports a more compelling proposition: that children customarily adopted in Tonga are treated exactly like natural children except with regard to inheritance rights. As the majority seems to recognize, preference status cannot and does not turn on inheritance rights because neither statutorily- nor customarily-adopted children in Tonga can inherit. The majority never says exactly what element or elements make for a "legally valid" adoption, but it seems to require some juridical act. The Service itself has rejected the notion that a juridical act is required for a legally valid adoption. *Matter of Kwok*, 14 I & N Dec. 127 (BIA 1972). Even if the test is

judicial acknowledgement, that test was met here since the only Tongan court ever to deal with the issue upheld the customarily-adopting parents' claim of custody over that of the natural grandfather. *In Re Lolesio,* 1 Tongan Law Report 14 (1911). In that case the Supreme Court of Tonga recognized that customary adoption gives the adoptive parents full legal custody and control over the child's upbringing to the same extent as any formal adoption. That opinion reads in its entirety as follows:

> An application for the custody of an illegitimate child (boy) aged 13½ years. When the child was 3 or 4 years old his mother gave him into the care of the applicant who thereafter cared for and looked after him, until he was taken away by one Kama the boy's grandfather, his father's father, shortly before the hearing. The boy's mother died when the boy was about 6 years old.
>
> HELD. The grandfather had no right to the custody and that the boy should be returned to the applicant.
>
> SKEEN, C. J. The boy is illegitimate and the mother has "pule." The father has no power, and therefore the grandfather has none. He has no succession rights under his father. The law does not recognize the father. The mother gave the boy to Soakimi (the applicant); he is the man who has control of the boy. The father has not given one penny, till the boy commences to get big he takes no notice of him. He is in the wrong. Order of the Court: Lolesio will return to Soakimi and will obey him in all things; if not Soakimi can punish him and Lolesio can complain to the Court if he is ill treated. Kama (grandfather) Paini and Mailau are warned to leave the boy alone. No fee charged.

Id.

The majority distinguishes Chinese customary adoptions, which are recognized by the Service, on the basis that Chinese law treats customarily-adopted children equally in all respects to natural children. In Tonga, it is true that customarily-adopted children are not treated exactly equally to natural children by reason of their lesser inheritance rights. The majority neglects the fact, however, that Tongan law does not even treat statutorily-adopted children equally to natural children because no adopted children in Tonga have inheritance rights (just as females, whether natural-born or adopted, have no inheritance rights under Chinese law). I can see no reason to discriminate between customarily-adopted children and statutorily-adopted children with regard to immigration status on this unprincipled basis. Accordingly, I would affirm the trial court's decision.

Order of the Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing in Banc

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
MAY TERM — June 2, 1982

FINAU F. MILA and ANAU S. FAINGA,
Plaintiffs-Appellees,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellant.

THE IMMIGRATION AND NATIONALITY LAWYERS ASSOCIATION,

Amicus Curiae.

No. 80-2072

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

This matter comes on for consideration of Appellees' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Judge McKay voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Chief Deputy Clerk

Opinion of the United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FINAU F. MILA and ANAU S. FAINGA,
Plaintiffs,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE
Defendant.

Civil No. C-79-0334

August 11, 1980

Charles B. Casper, Fabian & Clendenin, Salt Lake City, Utah, for plaintiffs.

Ronald L. Rencher, U.S. Atty., Wallace T. Boyack, Asst. U.S. Atty., Salt Lake City, Utah, for defendants.

MEMORANDUM DECISION AND ORDER

WINDER, District Judge.

This is a review of a decision of the Immigration and Naturalization Service ("Service") denying certain immigration benefits to plaintiffs.

The immigration of aliens to the United States is governed by the Immigration and Nationality Act

("Act"), 8 U.S.C. § 1101 *et seq.* The Act establishes a quota system limiting the number of immigrants in any given year. To determine which prospective immigrants will be given the limited number of available visas, 8 U.S.C. § 1153(a) creates six preference categories. Section 203(a)(5) of the Act, 8 U.S.C. § 1153(a)(5), confers fifth-preference status on the brothers and sisters of United States citizens.

Plaintiff Mila ("Petitioner") filed a visa petition with the Service seeking to have plaintiff Fainga ("Beneficiary") classified as an alien entitled to fifth-preference status, on the ground that Beneficiary is Petitioner's sister by adoption. The District Director denied the petition on the ground that Tonga, where the adoption took place, does not have a law providing for the adoption of legitimate children. The Board of Immigration Appeals ("BIA") affirmed, holding that if the civil law of a country does not recognize adoptions, no immigration benefits accrue under United States immigration laws based on adoptions alleged to have occurred in that country.

Because the law of Tonga does not provide for adoption of legitimate children, the BIA concluded that Petitioner could not establish that he and the Beneficiary once qualified as "children" of a common parent within the meaning of 8 U.S.C. § 1101(b)(1). Petitioner claims the requisite relationship exists by virtue of his mother's adoption of the Beneficiary. Petitioner asserts that the adoption was accomplished in accordance with 8 U.S.C. § 1101(b)(1)(E), which defines child as:

> [A] child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. . . .

The administrative record shows that the Beneficiary was adopted shortly after her birth by her natural mother's older sister. Thereafter she was raised as a member of her adopted mother's family, and hence a sister of the Petitioner. This practice is very common among the Tongan people. The record also reveals that Beneficiary's natural parents consented to the adoption and have renounced whatever rights they may have with respect to her. No question was raised in the administrative proceedings about the reality of the family relationship.

Plaintiffs claim that these facts establish an adoption under the BIA's own definition of "[v]oluntary acceptance of a child of other parents to be the same as one's own child." *Matter of Kwok*, 14 I. & N. Dec. 127, 130 (1972). Plaintiffs contend that the BIA's strict rule of recognizing an adoption only when it is affirmatively sanctioned by the local law, regardless of the nature of the local legal system or the local culture, is an erroneous interpretation of 8 U.S.C. § 1101(b)(1)(E) and goes against the intent of Congress to treat adopted children liberally in order to preserve genuine family units.

In determining the nature of the local legal system of Tonga, the court may consider any relevant material or source, pursuant to Rule 44.1, Fed.R.Civ.P. Plaintiffs have submitted the affidavit of Viliami Latu Tu'aki-

hekolo and other materials on Tongan law. Defendant has objected to this submission on the ground that the materials were not before the District Director and the BIA. Despite defendant's objection, the court finds that plaintiffs had no opportunity to submit materials on foreign law at the earlier administrative hearings. Therefore, the court will consider the materials submitted by plaintiffs on Tongan law, as well as the materials in the administrative record on Tongan law.

The Kingdom of Tonga is a group of approximately 150 islands in the South Pacific. Prior to 1845, the islands were governed by several local chiefs and were not subject to a central authority. In 1845, one of the chiefs, through a combination of military conquest and Christian conversion, brought the islands under his control and became known as King George Tupou I.

King Tupou was assisted in governing his newly unified kingdom by a number of English missionaries of the Methodist faith. One of the missionaries served as King Tupou's prime minister for many years and drafted a constitution designed to establish a system of law and government on the British model. Much of the impetus for a constitution lay in the fear that unless the Western powers that had forces in the area perceived the Tongan government as "civilized" by Western standards, they were likely to annex Tonga. The constitution was approved and became effective in 1875. Like the English constitution, the Tongan constitution omitted any reference to adoption.

Much of the Tongan legal system is quite different from pre-constitutional Tongan customs. However, where not inconsistent with the constitution or statutes, ancient customs continue to be observed. The Tongan courts enforce these customs on matters not specifically addressed in the constitution or statutes. The Tongan evidence code provides for the admission of evidence regarding customs. The Land Court, which hears all disputes involving land and noble titles, is advised by an "assessor," whose sole function is to sit with the court and advise it of Tongan customs.

For centuries, Tongans have practiced adoption, and the practice is a custom that antedates the constitution. Under the custom, a Tongan family will adopt a child (usually of a close relative) and will treat and raise the child just as a natural child. Customary adoptions are regarded by the community as creating a *bona fide parent-child relationship*. No provision of Tongan law authorizes the government to deprive the adoptive parents of custody of a child adopted in the customary way. If a child's natural parents give him up for adoption in the customary way, but later change their minds, they cannot obtain a court order or other governmental order compelling the child's return.

Given this background of Tongan history and law, it is clear to the court that under the undisputed facts of this case. Beneficiary qualifies under 8 U.S.C. § 1101(b)(1)(E), as "a child adopted while under the age of fourteen years" who has "been in the legal custody of, and has resided with, the adopting parent or parents

for at least two years." Having qualified under this section, Beneficiary is entitled to fifth-preference status under 8 U.S.C. § 1153(a)(5).

The court determines that the decisions of the District Director and BIA are unduly restrictive and misinterpret 8 U.S.C. § 1101(b)(1)(E). This court is of the opinion that if a *bona fide* parent-child relationship in fact exists, there is no reason to make a distinction between a society or legal system where such is sanctioned by law or where it is only recognized by custom. Where the clear legislative intent is to preserve the genuine family unit, the important inquiry must be to the reality of the relationship and not to the manner in which it arises.

Accordingly,

IT IS ORDERED that the decisions of the District Director and Board of Immigration Appeals are reversed and this case is remanded to the District Director to enter a finding that Beneficiary qualifies under 8 U.S.C. § 1153(a)(5) as a sister of a United States citizen and for further proceedings consistent with this decision.

A-19

Decision of the Board of Immigration Appeals

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

April 10, 1979

File: A21 605 489 - Salt Lake City

In re: ANAU SITAIA FAINGA, Beneficiary of visa petition filed by FINAU FATAFEHI MILA, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER:
Charles B. Casper, Esq.
Fabian & Clendenin
800 Continental Bank Bldg.
Salt Lake City, UT 84101

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

The petitioner applied for visa preference status for the beneficiary as his sister under section 203(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153 (a)(5). In a decision dated April 14, 1978, the District Director denied the petition. The petitioner has appealed. The appeal will be dismissed.

The petitioner, a United States citizen, native of Tonga, was born illegitimately on June 13, 1945, to Malakai Lavulo and Melenaite Mila. The beneficiary, a native and citizen of Tonga, was born legitimately on November 14, 1949, to Siale Hala and Seini Hala. Affidavits in the record reflect that the beneficiary was given immediately after birth to the petitioner's natural mother, the beneficiary's mother's older sister.

The District Director denied the petition on the ground that the law of Tonga does not provide for or recognize the adoption of legitimate children.

The respondent contends that the Immigration and Nationality Act does not require that an adoption create a legal status and that Tongan customary adoptions create family units which should be recognized under United States immigration laws.

In order to support a brother/sister relationship under section 203(a)(5) of the Act, a petitioner has to establish that he and the beneficiary once qualified as "children" of a common parent within the meaning of section 101(b)(1) and (2) of the Act. *Matter of Clahar*, Interim Decision 2643 (BIA 1978); *Matter of Gur*, Interim Decision 2560 (BIA 1977); *Matter of Rehman*, Interim Decision 2450 (BIA 1975); *Matter of Garner*, Interim Decision 2357 (BIA 1975); *Matter of Heung*, Interim Decision 2334 (BIA 1974). The petitioner claims the requisite relationship exists by virtue of his mother's adoption of the beneficiary. To establish his claim, the petitioner must prove that the adoption was

accomplished in accordance with 101(b)(1)(E) of the Act, which includes in the definition of child:

> [A] child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. . . .

This Board has consistently held that the question whether an adoption exists will be determined by reference to the law of the place where the purported adoption took place. *Matter of Garcia-Rodriguez,* Interim Decision 2630 (BIA 1978); *Matter of Dhillon,* Interim Decision 2620 (BIA 1977); *Matter of Benjamin,* Interim Decision 2505 (BIA 1976); *Matter of Park,* Interim Decision 2437 (BIA 1975); *Matter of Kwok,* 14 I&N Dec. 127 (BIA 1972); *Matter of Lau,* 10 I&N Dec. 597 (BIA 1964); and *Matter of R-,* 6 I&N Dec. 760 (BIA 1955). If the civil law of a country does not recognize adoptions, no immigration benefits accrue under United States immigration laws based on adoptions alleged to have occurred in that country. *Matter of Benjamin, supra.; Matter of Ashree, Ahmed and Ahmed,* 14 I&N Dec. 305 (BIA 1973); *Matter of Boghdadi,* 12 I&N Dec. 666 (BIA 1968).

We believe that Congress envisioned the "adoption" provided for in section 101(b)(1)(E) as creating a legal status. We have applied the rules set forth above at least since *Matter of R-, supra,* which was decided two years before the 1957 Amendments[1] which added

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[1] Public Law 85-316; 71 Stat. 639.

to the Act section 101(b)(1)(E) pertaining to adoptions. Moreover, in more than 20 years, and many amendments to the Act, Congress has not reversed our interpretation; instead it has reinforced it. Consider the current provision regarding adoption which is quoted above. It requires that the adoptee must have been "in the legal custody of . . . . the adoptive parent or parents. . . ." If adoption did not create a legal relationship, how could a petitioner prove that he had "legal custody" for two years? Accordingly, we adhere to our previous opinions that an adoption, to be recognized for immigration purposes, must create a legal relationship between the parent and child similar to that between a natural parent and child. *Matter of Benjamin, supra.*

The next question is whether the adoption in this case created the requisite legal relationship under the law of Tonga. We find that it did not. In adjudicating this petition, the Officer-In-Charge sought assistance from the Library of Congress. Mr. Kersi B. Shroff responded on behalf of the Library of Congress. He provided a copy of an opinion in which the Crown Solicitor of Tonga advised that the law of Tonga provides for the adoption of illegitimate children under certain circumstances, but that:

> There is no provision in our law for the adoption of children born legitimately. Nevertheless it has been a common practice in Tonga for relatives to raise and maintain children, including legitimate children as part of the family and to treat them in all respects as if they were legally adopted. Such "adoption" does not give the child any legal right in the estate of the foster parent and

> is not recognized as legally valid under Tongan law.

The petitioner challenges this conclusion as inadequate and not based on the facts in this case. However, it is supported by a source relied upon by the petitioner. *See* I. Brady, *Transactions in Kinship-Adoption and Fosterage in Oceania* (1976). The respondent provided us with a copy of chapter four of that volume: Morton, "Tongan Adoption." Mr. Morton relates that an exchange of children which he calls adoption is a frequent occurrence in Tonga. He explores the circumstances of these exchanges and their social acceptance. However, on page 65 he notes:

> Few applications for legal adoptions are made to the courts because the circumstances of Tongan adoptions are frequently incongruent with the European model of adoption *applied in the courts.* (Emphasis added)

As the respondent has not shown that the Crown Solicitor's opinion is erroneous, we will accept it as valid. Further, we find it inappropriate to recognize for immigration purposes adoptive relationships not legally recognized where they were created.

The burden of proof in visa petition proceedings is upon the petitioner. *Matter of Brantigan,* 11 I&N Dec. 493 (BIA 1966). A petitioner who relies upon foreign law to establish eligibility for an immigration benefit must prove that law as if it were a question of fact.

Matter of Annang, 14 I&N Dec. 502 (BIA 1973). The petitioner has failed to meet his burden in this case. Therefore, despite the equitable factors in this case, we must dismiss the appeal.

ORDER: The appeal is dismissed.

/s/ David L. Milhollan
Chairman

A-25

Decision of The District Director, Immigration and Naturalization Service

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Room 4103 Federal Building
125 South State Street
Salt Lake City, Utah 84138

Refer to this File No.
A21 605 489

Date: 14 Apr 1978

Finau Fatafehi Mila
1494 Richards St.
Salt Lake City, Utah 84115

DECISION

Upon consideration, it is ordered that your *petition to classify status of alien relative for issuance of immi*grant visa be denied for the following reasons:

* * *

Section 203(a)(5) of the Immigration and Nationality Act provides for the granting of preference status to the brothers and sisters of citizens of the United States. Section 101(b)(1)(E) of the Act defines the term "child" to include an adopted child if the child was legally adopted while under the age of fourteen.

The facts presented disclose that the beneficiary was born November 14, 1949 in Tonga to Siale Hala and Seini Hala, who were married in 1946. Siale and Seini

Hala were divorced in 1961. Affidavits submitted show that as of August 1, 1977 both natural parents were still living.

The law of Tonga makes provision for the adoption of illegitimate children. However, no provision is made for the adoption of children born legitimately, and although it is customary for relatives of parents to raise and maintain their children as if the children were adopted, this does not give rise to any legal consequences and the "adoption" is not recognized.

It is therefore concluded that the beneficiary is not entitled to any benefits based on this petition.

Sincerely,

/s/
Acting District Director

Office - Supreme Court, U.S.
FILED
DEC 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-581

In the Supreme Court of the United States

OCTOBER TERM, 1982

FINAU F. MILA AND ANAU S. FAINGA, PETITIONERS

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

RICHARD M. EVANS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Immigration and Naturalization Service erred in denying petitioner Fainga a permanent resident visa on the ground that she is not the "sister" of petitioner Mila, a United States citizen, because the Kingdom of Tonga, where petitioner Mila's mother allegedly adopted petitioner Fainga, does not recognized the adoption as lawful.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

B, In re, 9 I. & N. Dec. 521	6
Clahar, In re, 16 I. & N. Dec. 484	2
Gur, In re, 16 I. & N. Dec. 123	2
Heung, In re, 15 I. & N. Dec. 145	2
INS v. *Wang*, 450 U.S. 139	5
Kwok, In re, 14 I. & N. Dec. 127	6
Lolesio, In re, 1 Tongan Law Reports 14	9
R, Matter of, 6 I. & N. Dec. 760	6
Rehman, Matter of, 15 I. & N. Dec. 512	2
Udall v. *Tallamn*, 380 U.S. 1	6
Unemployment Compensation Commission v. *Aragon*, 329 U.S. 143	6

Statutes:

Immigration and Nationality Act, 8 U.S.C. (& Supp. V) 1101 *et seq.* :	
8 U.S.C. 1101(b)(1)	2
8 U.S.C. 1101(b)(1)(E)	2, 3, 4, 5, 7, 8

Page

Statutes—Continued:

8 U.S.C. 1101(b)(2) 2

8 U.S.C. 1153(a)(5) 2, 5

Miscellaneous:

H.R. 8123, 85th Cong., 1st Sess. (1957):

§ 1 7

§ 2 7

H.R. Rep. No. 1199, 85th Cong., 1st Sess. (1957) 7

S. 2792, 85th Cong., 1st Sess. § 2 (1957) 7

S. Rep. No. 1057, 85th Cong., 1st Sess. (1957) 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-581

FINAU F. MILA AND ANAU S. FAINGA, PETITIONERS

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 678 F.2d 123. The opinion of the district court (Pet. App. A-13 to A-18) is reported at 494 F. Supp. 998. The decisions of the Board of Immigration Appeals (Pet. App. A-19 to A-24) and the District Director (Pet. App. A-25 to A-26) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1982. A petition for rehearing was denied on June 2, 1982 (Pet. App. A-11 to A-12). On August 25, 1982, Justice White extended the time for filing a petition for a writ of certiorari to September 30, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, Finau F. Mila and Anau S. Fainga, are natives of the Kingdom of Tonga. Mila was born in Tonga in 1945. Fainga was born legitimately in Tonga on November 14, 1949. Shortly after Fainga's birth her mother turned her over to Mila's mother, who raised Fainga to adulthood.

Mila's mother and Fainga's mother both continued to reside in Tonga. Petitioner Mila, however, is a naturalized United States citizen residing in Salt Lake City, Utah. Petitioner Fainga currently resides there with him. Mila filed an immigration preference petition benefitting Fainga, claiming that she is entitled to a permanent resident visa preference as his adopted sister, under 8 U.S.C. 1153(a)(5).[1] In order to establish a brother-sister relationship under that provision, Mila was required to show that he and Fainga are "child[ren]" of a common "parent" within the meaning of 8 U.S.C. 1101(b)(1) and (2). See *In re Clahar*, 16 I. & N. Dec. 484 (BIA 1978); *In re Gur*, 16 I. & N. Dec. 123 (BIA 1977); *In re Rehman*, 15 I. & N. Dec. 512 (BIA 1975); *In re Heung*, 15 I. & N. Dec. 145 (BIA 1974). Because Mila claimed that the requisite relationship exists by virtue of his mother's adoption of Fainga, he was required to establish that Fainga was the adopted child of his mother within the meaning of 8 U.S.C. 1101(b)(1)(E), which includes within the pertinent definition of "child":

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[1] 8 U.S.C. 1153(a)(5) provides in pertinent part:

> (a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
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> > (5) Visas shall next be made available * * * to qualified immigrants who are the brothers or sisters of citizens of the United States * * *.

> [A] child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years * * *.

2. Respondent, the INS District Director, denied the preference petition on April 14, 1978, because Fainga would not be regarded as the adopted child of Mila's mother under the laws of Tonga, where the adoption allegedly occurred (Pet. App. A-25 to A-26). The District Director concluded (*id.* at A-26):

> The law of Tonga makes provision for the adoption of illegitimate children. However, no provision is made for the adoption of children born legitimately, and although it is customary for relatives of parents to raise and maintain their children as if the children were adopted, this does not give rise to any legal consequences and the "adoption" is not recognized.

The Board of Immigration Appeals dismissed petitioners' appeal (Pet. App. A-19 to A-24). The Board explained (*id.* at A-21 to A-22) that it had consistently held that the existence of an adoption for purposes of 8 U.S.C. 1101(b)(1)(E) turns upon whether the purported adoption is recognized as legally effective by the law of the place where it occurred. Quoting from an opinion of the Crown Solicitor for the Kingdom of Tonga, the Board concluded that a customary adoption such as occurred in this case "is not recognized as legally valid under Tongan law" (*id.* at A-23). Because petitioner Mila had not demonstrated that the Crown Solicitor's opinion misstated Tongan law, the Board upheld the denial of the preference petition.

The district court reversed the decision of the Board of Immigration Appeals (Pet. App. A-13 to A-18). Observing that customary adoptions are practiced in Tonga, and asserting that once such a customary adoption has been

consummated the natural parents cannot reacquire custody of the child by legal process, the district court concluded that Fainga qualified for an immigration preference as an adopted child of Mila's mother, *i.e.*, as his sister (*id.* at A-17 to A-18). The court concluded that the BIA's interpretation of Section 1101(b)(1)(E) was unduly restrictive because it could prevent unification of a "bona fide" family unit, contrary to what the court took to be the legislative intent (Pet. App. A-18).

3. A divided court of appeals reversed the judgment of the district court, upholding the denial of the preference petition (Pet. App. A-1 to A-10). The court initially rejected petitioners' contention that the Board of Immigration Appeals had misconstrued Tongan law (*id.* at A-5 to A-6). The court concluded that the evidence and authorities tendered by petitioners were not inconsistent with and did not overcome the statement by the Tongan Crown Solicitor cited by the Board. The court found no foundation in fact for petitioners' claim that the Board's analysis of Tongan law or its handling of customary adoptions under other legal systems unduly emphasized the inheritance rights (or lack thereof) of "adopted" children.

The court of appeals also rejected petitioners' broader contention that the Board of Immigration Appeals had misinterpreted 8 U.S.C. 1101(b)(1)(E), by making recognition under the law of the situs the test of effectiveness of a purported adoption (Pet. App. A-6 to A-7). The court explained that the Board's decision rested upon a reasonable construction of the statute that would "decreas[e] the likelihood of fraud, serving as a relatively bright line to determine which adoptions will be recognized for immigration purposes, and insuring that persons who bring adopted children into this country are legally responsible for their care" (*id.* at 7). Because the Board's interpretation was

reasonable, was not inconsistent with the pertinent legislative history, and represented a longstanding administrative interpretation of the statute by the body charged with its administration, the court of appeals sustained that interpretation.[2]

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals.[3] As the court below concluded, the Board of Immigration Appeals correctly interpreted the controlling statute and correctly applied that interpretation to the facts of this case. Further review accordingly is not warranted.

1. There is no merit to petitioners' broad contention (Pet. 5-6) that the Board of Immigration Appeals and the court of appeals gave an impermissible reading to 8 U.S.C. 1101(b)(1)(E) by requiring that a purported adoption be recognized under the law of the situs country in order to be effective for purposes of this branch of the statutory definition of "child." Contrary to petitioners' claim (Pet. i), this interpretation of the statute does not add an "extra-statutory requirement." For purposes, inter alia, of a preference application under 8 U.S.C. 1153(a)(5), Section 1101(b)(1)(E) treats as a child a person who is: "[(1)]

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[2]Judge McKay dissented, taking issue with the majority's view of Tongan law (Pet. App. A-8 to A-10), and urging more generally that 8 U.S.C. 1101(b)(1)(E) requires the INS to "review foreign adoptions with an eye to preserving genuine family relationships" (Pet. App. A-8).

[3]Petitioner claims (Pet. 10-13) that the decision below conflicts with the decisions of several other courts of appeals. The purportedly conflicting decisions, however, are actually ones rejecting the INS's interpretation of other statutory provisions. They demonstrate at most that the INS is not invariably sustained on questions of statutory interpretation. But the views of the INS are entitled to substantial deference. Cf. *INS* v. *Wang*, 450 U.S. 139, 144 (1981). The fact that it has not been upheld on every occasion is scarcely sufficient to occasion review here.

adopted [(2)] while under the age of fourteen years [(3)] if the child has thereafter been in the legal custody of, and [(4)] has resided with, the adopting parent or parents for at least two years" (emphasis added). The term "adopted" is one of the statutory requirements. Yet this term is "not self-explanatory, and reasonable men could easily differ as to [its] construction" (*INS* v. *Wang*, 450 U.S. 139, 144 (1981)). The longstanding and consistent view of the Board of Immigration Appeals that the validity of an adoption for immigration purposes is to be governed by the law of the place where the adoption occurred[4] is thus merely an interpretation of the statutory requirements.[5] Accordingly, the INS' views on this question are entitled to substantial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946).

Nor is the BIA's interpretation of the statute an unreasonable one. Plainly some criterion is needed to distinguish adoptions from the infinite variety of more informal arrangements for child-rearing by persons other than a natural

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[4]See, *e.g.*, *In re Kwok*, 14 I. & N. Dec. 127 (BIA 1972); *In re B*, 9 I. & N. Dec. 521 (BIA 1961); *In re R*, 6 I. & N. Dec. 760 (BIA 1955).

[5]Contrary to petitioners' suggestion (Pet. i, 5-6), the INS has not declined to recognize any and all customary adoptions under Section 1101(b)(1)(E) and it has not restricted recognition to adoptions accomplished by a judicial act. Rather, the test is whether a customary adoption is regarded as legally valid by the law of the nation where the purported adoption occurred. See *In re Kwok*, *supra*, 14 I. & N. Dec. at 130; see Pet. App. A-4. As the Board explained in *In re B*, *supra*, 9 I. & N. Dec. at 521-522:

> [I]n the absence of a statutory procedure of adoption, the petitioner must establish that a custom existed * * * which was recognized officially as resulting in a legal adoption, legally binding upon the parties concerned, and * * * that the adoption of the beneficiary by the petitioner conformed with these customs and resulted in a legal adoption.

parent that exist in various nations. The criterion adopted by the Board, resting as it does upon the legal effectiveness of the acts (claimed to effect an adoption) where consummated, is a familiar one in the law, especially the law of domestic relations. Therefore, it cannot be regarded as contrary to congressional intent absent some clear indication in the legislative history.

The legislative history cited by petitioners (Pet. 9) does not supply any such indication. Although petitioners assert that these materials reflect an intent "that the Act be liberally construed to recognize bona fide family relationships and preserve genuine family units," they actually shed no light at all upon the question presented here. Petitioners do not suggest that the statements quoted address the narrow question of the proper interpretation of the term "adopted" in Section 1101(b)(1)(E). And while there are references to a policy of family preservation in the legislative history,[6]

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[6]Petitioners' reliance (Pet. 9) on certain legislative history materials, *e.g.*, H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7-8 (1957), is misplaced. The pages cited pertain to Section 2 of the House bill, H.R. 8123, 85th Cong., 1st Sess. (1957), which dealt with the status of illegitimate children, and did not touch upon the treatment of adopted children at all. The present 8 U.S.C. 1101(b)(1)(E) was derived not from the House bill, which was not enacted, but from its Senate counterpart, Section 2 of S. 2792, 85th Cong., 1st Sess. (1957), which passed in its stead. The accompanying report sheds little light upon the meaning of the term "adopted," although it stated that the bill contains "[a]dequate safeguards * * * to prevent abuse." S. Rep. No. 1057, 85th Cong., 1st Sess. 4 (1957). There is nothing in the Senate Report that would suggest that Congress assigned a special, non-legal meaning to the term "adopted," such as petitioners suggest. Section 1 of the House bill did address the status of adopted children, albeit in a manner somewhat different from the Senate bill. To the extent that it is relevant to the Act as it emerged, the House Report undercuts petitioners' argument. The report reveals that the focus of congressional concern was to facilitate "adopti[on of] alien orphans and offering them the benefits and the loving care of American homes." H.R. Rep. No. 1199, *supra*, at 4-5. In this context Congress understandably did not focus upon the meaning of the term

these statements do not suggest that the legal status of a purported adoption in the place where it occurred is to be disregarded in determining whether a collection of individuals should be regarded as a "family." Nor is there anything in the legislative history that suggests that the INS or a court is to determine the existence of a family relationship on a case-by-case basis by assessing the genuineness of family feeling—the alternative criterion petitioners suggest. As the court of appeals recognized (Pet. App. A-7), any such inquiry would be highly subjective, administratively burdensome, and an invitation to fraud. There is no reason to believe that Congress required the use of such an approach.[7]

2. Petitioners' contention (Pet. 6-10) that the Board misinterpreted Tongan law was correctly rejected by the court of appeals for the reasons stated (Pet. App. A-5 to A-6). Assuming, as petitioners claim, that Tongan law does not permit a natural parent to reacquire through legal process

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"adopted." The use of that term, however, presumably contemplates that anyone adopting a child abroad or bringing the child to the United States for purposes of adoption should employ legally effective procedures.

[7]There is no evidence to support petitioners' assertion (Pet. 5-6) that the Board's interpretation of 8 U.S.C. 1101(b)(1)(E) has separated functioning families. We note that the Board's ruling in this case has no such onerous result. Petitioner Fainga is a 33-year-old adult, who wishes to reside in Utah with her 37-year-old cousin. The "adoptive mother," however, continues to reside in Tonga.

As the court of appeals recognized (Pet. App. A-7), the Board's interpretation of Section 1101(b)(1)(E) has the virtue of providing adoptive parents a much higher degree of certainty as to whether a purported adoption will be recognized for immigration purposes by the United States than does petitioners' alternative criterion. Persons wishing to immigrate to the United States with adopted children are benefitted by the enhanced predictability of determinations made pursuant to the Board's interpretation of the statutory definition.

custody of a child once surrendered to another for customary adoption, it does not follow that Tongan law treats the customary adoption as legally effective to create general parental rights in the adopting parent. As explained above (pages 5-6), the requirements that the child seeking an immigration preference be "adopted" and that the adopting parent have legal custody of the child are separate elements of the showing required by 8 U.S.C. 1101(b)(1)(E). To treat legal custody as establishing an adoption would accordingly frustrate the legislative intent.

Petitioners' contention respecting custodial rights under Tongan law rests upon a single reported decision rendered in 1911, refusing to award custody of an illegitimate child to the boy's paternal grandfather. In that case, the mother had given the boy to another to raise him, and the father had neither acknowledged nor supported him.[8] The natural mother apparently had done nothing to revoke her decision that her son should be raised by the third person, and the custodian of the child apparently had not indicated a willingness to surrender him. The court's refusal to award custody to the grandfather rested upon the father's lack of parental rights and lack of equity. The decision plainly does not establish that the parental rights of the legitimate parent are severed by a customary adoption; indeed, it appears to suggest the contrary.

Contrary to petitioners' suggestion (Pet. 8), the Board's interpretation of Tongan law does not place improper emphasis upon the lack of inheritance rights of children adopted by custom. While the Crown Solicitor's opinion does state that a customary adoption gives rise to no interest in the estate of the "foster parent," it also specifies that such

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[8]The text of the opinion in question, *In re Lolesio*, 1 Tongan Law Reports 14 (1911), is reproduced in its entirety in Judge McKay's dissenting opinion in the court of appeals (see Pet. App. A-9).

an "adoption" is "not recognized as legally valid under Tongan law" (Pet. App. A-22 to A-23). The Board and the court of appeals properly relied upon the latter statement.[9] In any event, petitioner's contention respecting Tongan law does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]The Crown Solicitor's use of the term "foster parent" (Pet. App. A-22) to describe the "adoptive" parent is also revealing.

DOJ-1982-12